Supreme Court, U.S.
FILED
OCT 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-889

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

STATE OF COLORADO,

vs.

STEVEN LEE BERTINE.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

REPLY BRIEF FOR THE STATE OF COLORADO

ALEXANDER M. HUNTER
District Attorney

C. PHILLIP MILLER
Assistant District Attorney

JOHN M. HARIED
Deputy District Attorney

RICHARD F. GOOD
Deputy District Attorney

Post Office Box 471
Boulder, Colorado 80306
(303) 441-3700

TABLE OF CONTENTS

Page

Table of Authorities . . . . . (iii)

Introduction 1

Argument

I. RESPONDENT'S CLAIM THAT THE SEARCH IN THIS CASE WAS NOT A VALID INVENTORY SEARCH DIRECTLY CONTRADICTS THE FACTUAL FINDINGS OF THE TRIAL COURT AND THE RECORD 3

II. RESPONDENT'S RELIANCE UPON CHADWICK AND SANDERS IS MISPLACED. 4

III. RESPONDENT'S ARGUMENT THAT CLOSED CONTAINER INVENTORY SEARCHES VIOLATE THE FOURTH AMENDMENT MISAPPREHENDS THE UNDERLYING RATIONALE OF THE INVENTORY SEARCH EXCEPTION AND IS BASED UPON FALSE ASSUMPTIONS AND IMPRACTICAL SUGGESTIONS. . 5

A. The Consent Theory. . . . 5

B. The "Leave It" or "Take It Sealed" Theory. 7

C. The "Container-by-Container" Balancing Theory. 12

IV. RESPONDENT'S ASSERTION THAT LAFAYETTE DOES NOT APPLY TO AUTOMOBILE INVENTORY SEARCHES IGNORES THE FACTS. 15

TABLE OF CONTENTS
(Continued)

Page

V. RESPONDENT'S ARGUMENT THAT THE BOULDER POLICE DEPARTMENT REGULATIONS PUT UNLAWFUL DISCRETION IN THE HANDS OF POLICE OFFICERS MISCONSTRUES THE REASONING OF OPPERMAN. . . 17

VI. RESPONDENT'S PREDICTION THAT A "PARADE OF HORRIBLES" WOULD FLOW FROM REVERSAL OF THE COLORADO SUPREME COURT IS UNJUSTIFIED. 18

TABLE OF AUTHORITIES

Page

Cases:

Arkansas v. Sanders,
442 U.S. 753 (1979) 4

Ciriago v. State,
471 A.2d 320 (Md. App. 1984). . . . 19

Hill v. United States,
512 A.2d 269 (1986) 2, 19

Illinois v. Lafayette,
462 U.S. 640 (1983) . . . . . passim

New York v. Belton,
453 U.S. 454 (1981) 20

People v. Bertine,
706 P.2d 411 (1985) 2

People v. Gonzalez,
465 N.E.2d 823 (N.Y. 1984). 12

People v. Nogel,
484 N.E.2d 516 (Ill. App. 1985) . . 20

People v. Rutovic,
566 P.2d 705 (Colo. 1977) 20

South Dakota v. Opperman,
428 U.S. 364 (1976) . . . . . passim

United States v. Chadwick,
433 U.S. 1 (1977) 4, 20

United States v. Ross,
456 U.S. 798 (1982) 20

Cases--Continued Page

United States v. Trullo,
No. 85-1708 (1st Cir. May 14, 1986) 12

Wooldridge v. State,
696 S.W.2d 252 (Tex. Ct. App. 1985) 12

Statutes:

Colorado Revised Statute
§42-4-1202(3). 6

Colorado Revised Statute
§42-2-122.1(1)(a). 6

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM
1986

CASE NUMBER 85-889

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner,

vs.

STEVEN LEE BERTINE,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF COLORADO

REPLY BRIEF FOR THE STATE OF COLORADO

INTRODUCTION

The Respondent has filed a brief, as have the American Civil Liberties Union and the Colorado Criminal Defense Bar, Inc. as amici curiae. In reply Petitioner seeks to correct several erroneous claims in Respondent's brief and to show the legal and pragmatic problems inherent in the arguments of Respondent and his amici curiae.

Before replying to Respondent's specific arguments, several general observations are appropriate.

Every case cited by Respondent in support of his position that closed container searches are unreasonable was decided prior to Illinois v. Lafayette, 462 U.S. 640 (1983).[1] Several of those cases were decided prior to South Dakota v. Opperman, 428 U.S. 364 (1976). Some have been overruled since Lafayette.[2]

On the other hand, every appellate decision since Lafayette has upheld inventory searches of closed containers in automobiles. The Colorado Supreme Court's

---

[1] Br. Res. 28 n.11.

[2] Although it was not noted in Respondent's brief, two cases cited in his footnote 11, State v. Potter, 648 P.2d 1162 (Kan. 1982) and State v. Morgan, 600 P.2d 155 (Kan. 1979), were specifically overruled in State v. Fortune, 689 P.2d 1196, 1203 (Kan. 1984). Additionally, Cirago v. State, 471 A.2d 320 (Md. App. 1984), implicitly overruled two other cases cited by Respondent: State v. Smith, 427 A.2d 1064 (Md. App. 1981) and Manalanson v. State, 415 A.2d 308 (Md. App. 1980).

decision in this case is the lone exception. The cases upholding searches are cited in Petitioner's brief, pages 39-43, and in the United States brief, page 18 n.7. Recently, the District of Columbia Court of Appeals upheld the inventory search of a wallet-like zippered key case found in an automobile on the basis of Lafayette. Hill v. United States, 512 A.2d 269, 277 (D.C. App., July 3, 1986).

Respondent appears to suggest either a lack of ripeness, because the Colorado Supreme Court had no authority to address the federal constitutional issue on interlocutory appeal, or a lack of a federal question, due to an adequate and independent state ground. (Br. Res. 1-4). Neither claim is justified. The Colorado Supreme Court plainly concluded that it had the authority to address the federal law question. That court was unequivocal in resting its decision upon the Fourth Amendment and no other ground: "[b]ecause we view the search here as violative of the fourth amendment protections, we need not decide whether article II, section 7 of the Colorado Constitution provides the citizens of this state with greater protections than the United States Constitution in the area of automobile inventory searches." People v. Bertine, 706 P.2d 411, 419 (Colo. 1985); Pet. Cert. 50-51. Clearly, it is not for this Court to question the Colorado Supreme Court's interpretation of Colorado judicial procedures.

Petitioner has organized Respondent's arguments under six general headings. Each is discussed separately.

I. RESPONDENT'S CLAIM THAT THE SEARCH IN THIS CASE WAS NOT A VALID INVENTORY SEARCH DIRECTLY CONTRADICTS THE FACTUAL FINDINGS OF THE TRIAL COURT AND THE RECORD.

Notwithstanding the explicit factual findings of the trial court to the contrary, Respondent in his brief claims that "[t]he facts of this case show that the initial investigative motive of the search of the backpack was later justified by a 'routine' impoundment and inventory." (Br. Res. 14, 18-19).[3] Respondent raised the same argument in the trial court. The trial court specifically rejected this allegation, and made a factual finding that the decision to impound and inventory the vehicle was done in good faith and was "not a pretext for an investigative search." (J.A. 81-82, 86-87).

---

[3] In a paragraph alleging that the inventory search was a "sham" Respondent erroneously quoted the record. In its findings the trial court stated "that the vehicle was inventoried first and the backpack later. And that the inventories were done by different people." (J.A. 82). The quote, as it appears in Respondent's brief, reads like this: "[t]he trial court found that the 'inventory listing items in the backpack was done much later by someone else.' (J.A. 82)." (Br. Res. 18). Several other allegations in that paragraph (Br. Res. 18-19) are unsupported by the portions of the record cited and are contrary to the trial court's factual findings (J.A. 81-82, 86-87).

II. RESPONDENT'S RELIANCE UPON CHADWICK AND SANDERS IS MISPLACED.

Respondent argues that an inventory search of closed containers located in an automobile is permissible only if "based upon a prior determination of probable cause, and, absent a recognized exception to the warrant requirement, only upon issuance of a warrant." (Br. Res. 24). This claim amounts to an evisceration of the concept of an inventory search and, in effect, asks this Court to overrule its decisions in Opperman and Lafayette.

Both United States v. Chadwick, 433 U.S. 1 (1977), and Arkansas v. Sanders, 442 U.S. 753 (1979), involved investigative searches where the police had probable cause to believe, before the search, that a container in the suspect's possession held contraband. This Court has rejected the notion that the rationale of Chadwick and Sanders bears upon inventory searches. Lafayette, 462 U.S. at 643-644; Chadwick, 433 U.S. at 10 n.5.

Respondent fails to recognize that the justification for the search in this case is the inventory exception, not the automobile exception. The mere fact that both exceptions do apply to automobiles does not mean, as Respondent seems to argue, that the automobile exception must in every instance supersede an inventory search analysis. In other words, Respondent errs in suggesting that the mere fact that the backpack in this case was found in an automobile somehow immunizes it from an inventory search of essentially the same scope as that upheld in Lafayette. Certainly nothing in Chadwick or Sanders suggests such an "automobile exception" to the inventory search doctrine.

III. RESPONDENT'S ARGUMENT THAT CLOSED CONTAINER INVENTORY SEARCHES VIOLATE THE FOURTH AMENDMENT MISAPPREHENDS THE UNDERLYING RATIONALE OF THE INVENTORY SEARCH EXCEPTION AND IS BASED UPON FALSE ASSUMPTIONS AND IMPRACTICAL SUGGESTIONS.

Respondent and the American Civil Liberties Union advance three separate theories allegedly showing that closed container inventory searches are unreasonable. Each is based upon false assumptions and impractical suggestions. In addition, they misconstrue the nature of Fourth Amendment requirements because each depends upon the "less intrusive means" analysis which was rejected in Lafayette.

A. The Consent Theory

The American Civil Liberties Union suggests that closed container inventory searches violate the Fourth Amendment absent the consent of the owner of the vehicle. (Br. ACLU 9). Obviously, if consent were a prerequisite to inventory searches the entire inventory exception to the warrant requirement would be absorbed into the consent exception. In effect, Lafayette and Opperman would be overruled.

Further, such a per se requirement is totally impractical. In many cases the owner may be incapacitated and unable to make a decision; for example, where there is an accident and the owner suffers personal injuries requiring immediate hospitalization. Occasionally the owner may be incapacitated due to intoxication, as in this case. It makes no sense to require the police to arrest an intoxicated person and then turn around and request that same person to make an intelligent, responsible decision about park and lock, release of the vehicle to a

third person, or an inventory of the contents of the vehicle. By law in Colorado, as in many other states, a police officer has an obligation to provide an allegedly drunken driver with a breath or blood test within a short time of his arrest.[4] This is for the benefit of the arrested person as well as the state.

If consent was a prerequisite to an inventory search the police officer would have to post someone with the car, drive Mr. Bertine to the nearest telephone, wait while he called several friends to see if anyone was willing to come out and pick up his car in the middle of the night, wait longer while the friend drove to the scene of the arrest, and then check out the friend's sobriety and driver's license. If the scene of the arrest was far outside of town the delay would be even greater. When coupled with the unruly, argumentative, or boisterous demeanor of many intoxicated persons, such an elaborate procedure is totally unworkable. Also, it would delay removal of the vehicle which may be a hazard or impediment to other traffic.

In many instances the owner of the vehicle will not be present at the time of impoundment. This would occur where the vehicle was moved because of a snow or flood emergency, because it was illegally parked in a handicapped space or near a fire hydrant, or because it was illegally parked on private property.

---

[4] Colorado Revised Statutes (C.R.S.) §42-4-1202(3) (1973) requires that a blood alcohol test be performed upon the request of the police officer or the arrested person. The test must be performed within one hour. C.R.S., §42-2-122.1(1)(a).

Finally, the driver of a vehicle may not be the owner and therefore not have authority over its disposition or standing to consent to an inventory of its contents. For all of these reasons it would be impractical to require consent of the owner of the vehicle as a prerequisite to an inventory search.

The notion of requiring consent was rejected in Opperman. There the Court stated that the consent theory was based upon the false assumption that the inventory was exclusively for the protection of the car owner; false because the inventory also protects the police and municipality from claims of lost or stolen property and the public from vandals who might find dangerous items in the car. Id., 428 U.S. at 376 n.10. Because the consent theory is impractical and inadequate to protect all of the interests at stake, it should be rejected again by this Court.

B. The "Leave It" Or "Take It Sealed" Theory

Respondent urges the Court to adopt a different per se rule whereby all closed containers shall not be inventoried unless their contents are in plain view or are reasonably believed to be dangerous. (Br. Res. 40).[5] This proposal is based upon

---

[5] Of course, under this test, the searches in both Opperman and Lafayette were unconstitutional. The contents of the glove compartment and the shoulder bag were neither in plain view nor reasonably believed to be dangerous. Respondent's test ignores the rationale of the

the assumption that closed containers can be inventoried "as a unit" either by leaving the container in the vehicle and noting it on an inventory report or by seizing the container, sealing it in a closed condition, and storing it in the police department. Obviously, closed containers may be either left in an automobile or seized, but Respondent is mistaken in concluding that either of these procedures satisfies all of the interests involved. A close examination of each procedure demonstrates this.

To illustrate the "leave it" and "take it sealed" alternatives, assume a typical scenario: Mr. A is driving to work and is involved in an intersection collision and suffers head and chest injuries. His car sustains disabling damage to the engine and steering. Mr. A is immediately removed to the hospital by ambulance attendants and the police must clear his vehicle from the intersection to permit normal traffic. In the back of Mr. A's stationwagon is a closed cardboard box containing three sophisticated remote television cameras worth three thousand dollars, a handgun, holster, and some written contracts, all items related to his employment in the private security business. Officer Smith is assigned to deal with Mr. A's vehicle and observes the cardboard box during his routine inventory. The car is about to be towed

---

inventory search exception, which is grounded on the routineness of its administration, by proposing that inventory searches be subjected to standards developed to apply to searches conducted in other contexts and for other purposes.

by an attendant of City Towing to the impound lot which lies at the edge of town and which is part of a junk yard and used auto parts business.

Under Respondent's theory Officer Smith may either leave the box or seize it. First assume that because Officer Smith has no way of evaluating the contents of the box he decides to leave it unopened in the car. In this case no interests are served except for Mr. A's interest in the privacy of the contents of the box. The public is not protected from any latent danger posed by the gun. Mr. A's possessions are taken from him and placed for indefinite time somewhere where they are exposed to the risk of theft or vandalism. Further, in the event of theft, Mr. A has no means of assessing responsibility between the police, the tow company, or the impound lot.

Likewise, in the event of a claim of theft, the police have no way of protecting themselves from undeserved liability. For example, if Mr. A claims three television cameras were in the box and the police inventory form shows three cameras in the box, but only two cameras are there when Mr. A goes to claim his property, it is easy to establish that liability lies with the tow company (if the property was left in the car) or the evidence custodian. Similarly, if after retrieving his car Mr. A claims that a rare and expensive Chinese vase was taken from the cardboard box and sues the police department, the fact that the police inventory report shows that the box contained only items used in Mr. A's business may help persuade a jury that Mr. A's claim was false.

Neither inventoring nor sealing closed containers is an absolute guarantee against theft by the officer conducting the inventory. Routine inventories are substantially related to the goals of

providing an accurate accounting of property within the control or responsibility of the police in an effort to protect the owner's property interest and protect the police from false claims. The inventory procedure narrows down the list of potentially responsible persons and that in and of itself discourages theft or careless handling.

If on the other hand Officer Smith elects to take custody of the cardboard box for safekeeping many practical problems arise. First, Officer Smith must evaluate the box to see if it contains anything by picking it up, shaking it slightly, or other measures. Then he must carry the box to his patrol car, drive it to the station, and carry it to the evidence room. There he signs it over to an evidence custodian who must carry it into the evidence room, mark it, log it in the records, and carry it to a shelf or other storage space. The box remains there for days, weeks, or months depending on a wide range of factors over which the evidence custodian has no control and about which no certain predictions can be made. Eventually Mr. A comes to the police department, signs out the box, and carries it through the halls of the police department to the door.

The impracticality of this procedure is apparent. Each person who must handle, transport, and store the box has no information about latent dangers or special handling requirements of its contents. In the case of Mr. A's box neither Officer Smith nor the evidence custodian has any idea that the gun is in the box, nor do they know whether the gun is loaded, whether the safety is on or off, whether the gun is in good working order or defective, or whether other items inside the box could trigger the gun by accident as a result of jostling, shaking, or other movement. If the box contained

fungible items like meat or produce, delicate items like crystal, or volatile chemicals there would be no way of determining these special handling needs.

Under the "take and seal" option the police are in a situation identical to that in Lafayette. There the inventorying of closed containers was reasonable not only because of the dangers posed to the arrestee or other jail inmates, but also because of the danger posed to jail personnel who had to take in items, store them, and then return them to the arrestee. Id., 462 U.S. at 646. It would make no sense to expose the patrol officer and evidence custodian to risks that jail personnel are protected from.

Other practical considerations militate against the "take and seal" option. This option involves a tremendous expenditure of time and space resources. The police officer who seizes an item must leave his patrol duties on the street and come into the stationhouse for the period of time it takes to locate the evidence custodian and log in the item. This drains police resources from the place they are needed most: on the street. Likewise the evidence custodian must take time from his regular duties to handle an entirely new class of property. The evidence room at the Boulder Police Department is literally filled to overflowing with boxes containing evidence from an ever increasing number of criminal cases. If only one out of three impounded automobiles required the storage of a medium-sized closed container, such a program in Boulder County probably would consume many additional man-hours per week and a large percentage of additional storage space. Neither the "leave it" or "take it sealed" option is practical, nor does either option protect the individual and governmental interests at stake.

C. The Container-By-Container Balancing Theory

Finally, Respondent resorts to the container-by-container balancing test advocated by the Colorado Supreme Court. Under this test the reasonableness of each inventory search is determined on a post hoc basis by looking at container-specific or case-specific factors. For example, Respondent argues that container-specific factors should control in every case; i.e. no container shall be inventoried "unless its contents are in plain view or are reasonably believed to be dangerous." (Br. Res. 41). This approach ignores reality and practicality. Most closed containers,[6] unless they are a gun case or box labeled "dynamite," by their very nature do not disclose their contents. In this case seven hundred dollars cash was kept inside of a tin can. (R. 65).

The container-specific analysis was rejected in Lafayette where the Court stated:

---

[6] To the virtual exclusion of any other term, the word "luggage" appears in the Respondent's brief approximately forty-five times and in the American Civil Liberties Union's brief approximately forty-four times. The cases cited in the briefs demonstrate that a wide variety of closed containers are commonly encountered within automobiles. See, e.g. United States v. Trullo, No. 85-1708 (1st Cir. May 14, 1986) (false Pennzoil can); Wooldridge v. State, 696 S.W.2d 252, 254-255 (Tex. Ct. App. 1985) (8-track case); People v. Gonzalez, 465 N.E.2d 823, 824-825 (1984) (paper bag).

> "[i]t is immaterial whether the police actually fear any particular package or container; the need to protect against such risks arises independent of a particular officer's subjective concerns. * * * [I]t would be unreasonable to expect police officers in the every day course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit."

Id., 462 U.S. at 646, 648.

The American Civil Liberties Union's list of case-specific factors is naive and impractical. First, it suggests that the inventory was unnecessary and therefore unreasonable because Mr. Bertine's car could have been towed to the nearby parking lot of a small private shopping center. (Br. ACLU 41). Conveniently, the American Civil Liberties Union overlooks the problem of who will pay for this towing operation or how the towing company will be assured of payment by the owner. The police have no money to pay for it, and Mr. Bertine certainly would not feel obligated to the towing company after simply retrieving his car. In practical terms, the towing company would have no means of getting paid except for a civil lawsuit. Further, the parking lot referred to was private property and the police had no right to put automobiles there for any length of time. Such a procedure does nothing to protect the individual or governmental interests at stake.

Next the American Civil Liberties Union claims that the reasonableness of the inventory should turn upon the security afforded by the impoundment

facility or the length of time the arrestee is likely to spend in police custody. (Br. ACLU 36 n.12, 38 n.13). The security provided by impound lots varies widely. Just within Boulder County there are many differing facilities whose characteristics depend largely on the size of the community. Surely this is true around the nation. No impound lot is totally secure.

Likewise, the length of time the police have custody of an automobile varies greatly. In some cases it may take days to locate the owner. How long an arrestee remains in custody is not known until he appears before a judge or other bonding magistrate. Whether he is released on bond will depend upon his own financial resources as well as his ties to the community, his criminal history, the circumstances of his arrest, and how these things are viewed by the bonding magistrate. The patrol officer knows nothing about these factors. It is not uncommon for people arrested for DUI to spend thirty to ninety days in jail awaiting a trial or plea bargain.

The container-by-container balancing analysis is impractical because each situation presents too many variables, the relative significance of which is made known to the police officer for certain only after a post hoc adjudication. This puts the police officer in the untenable position of having to guess about how to do his job.

Further, a container-by-container analysis fundamentally contradicts the rationale of the inventory search exception. As stated by the United States in its brief, "[t]he permissibility of a routine inventory search does not turn on whether the facts of a particular case support one or more of the justifications underlying the adoption of an inventory

procedure -- indeed, the practice would not be 'routine' if it did." (Br. U.S. 16).

Contrary to Respondent's claim, there is no need for a particularized inquiry of reasonableness to justify each inventory. Neither the reasonableness of an individual's expections of privacy in a particular container nor the availability of less intrusive alternatives or the presence of exigent circumstances in a particular case affects the validity of a routine inventory search. Inventory searches are justified by the overall reasonableness of routine inventory procedures.

When reduced to their essence, the two per se rules and the container-by-container analysis amount to, in one form or another, a "less intrusive means" test. Respondent has described three proposals that he believes are "more reasonable" than the alternative of inventorying closed containers. A close examination of these three alternatives shows that in fact they are inadequate to deal with all of the governmental interests involved or are impractical in light of the realities of handling, transporting, and storing closed containers. Instead of being "more reasonable" alternatives, they are in fact less reasonable.

IV. RESPONDENT'S ASSERTION THAT LAFAYETTE DOES NOT APPLY TO AUTOMOBILE INVENTORY SEARCHES IGNORES THE FACTS.

Respondent claims that the governmental interests at stake in an automobile inventory search are much different than, and much less than, the governmental interests in a booking desk inventory. (Br. Res. 34-37). In support Respondent simply asserts, without more, that there is a more compelling need to

search for weapons and other dangerous items at the booking desk than during a vehicle impoundment. In his dissent to the opinion below, Justice Rovira succinctly answered that assertion:

> Although this reasoning is sound when searching the actual person of an arrestee, it makes absolutely no sense when applied to searches of containers within the detainee's possession. The police can just as easily note, seal, and store a backpack found on the person of an arrestee as it can a knapsack found in the back seat of an automobile. In both cases, once the container is removed from the reach of the arrestee, the threat of weapons or contraband being introduced to the jailhouse no longer exists. * * * Yet, Lafayette declined to impose on law enforcement agencies such a duty to seal and store. (Pet. Cert. 71-72).

As explained in Petitioner's opening brief, the governmental interests in safekeeping property, being free from unjustified liability, and protecting the public are substantially the same whether the inventory search is conducted on the street or at the booking desk. This is particularly true where containers are brought to the stationhouse for safekeeping.

V. RESPONDENT'S ARGUMENT THAT THE BOULDER POLICE DEPARTMENT REGULATIONS PUT UNLAWFUL DISCRETION IN THE HANDS OF POLICE OFFICERS MISCONSTRUES THE REASONING OF OPPERMAN.

Respondent erroneously claims that in Opperman "the decision to inventory was non-discretionary. All abandoned cars were impounded and inventoried." (Br. Res. 17-18). In Opperman the defendant's car was towed and impounded after it was illegally parked on a downtown street and two parking violation citations had been placed on the windshield. Part of the citation warned: "Vehicles in violation of any parking ordinance may be towed from the area." Id., 428 U.S. at 365. (Emphasis added.) Clearly, the Vermillion Police Department did not have a rigid rule requiring impoundment of every illegally parked vehicle. The thrust of the reasoning in Opperman, as stated by Justice Powell in his concurring opinion, was that once the decision to impound a vehicle was made the procedure from that point on was standardized. Id., 428 U.S. at 380 n.6. Nothing in Opperman leads to the conclusion that reasonable discretion in the decision to impound invalidates the subsequent inventory procedure.

Indeed, a tenet of constitutional law that predicated the reasonableness of an inventory procedure on a rigid rule requiring impoundment whenever there was legal justification would be overbroad. It would lead to the seizure of vehicles in many situations where a lesser response was entirely appropriate. More vehicles would be impounded and many more citizens' privacy would be disturbed, all for no reason.

Conversely, a rigid policy requiring park and lock or release of the vehicle to a third party would be impractical. A sober, responsible third party is not

always available. Leaving a vehicle where it is found is not an option if it is illegally parked or blocking traffic.

The availability of discretion in the decision to impound does not implicate the wide range of concerns about overzealous police activity in the execution of investigative functions. Such discretion does not immunize the police from judicial scrutiny to insure that the inventory procedure is not being used to conceal an investigatory motive. This case is a perfect illustration of that.

VI. RESPONDENT'S PREDICTION THAT A "PARADE OF HORRIBLES" WOULD FLOW FROM REVERSAL OF THE COLORADO SUPREME COURT IS UNJUSTIFIED.

The American Civil Liberties Union predicts that closed container inventory searches will lead to random searches of "[c]ars parked near governmental buildings or, indeed, shopping centers; houses located near defense installations" and "[w]hy not luggage in any vehicle parked in any public place?" (Br. ACLU 33, 37). This vision is boundless: they foresee a world where even homes and hotel rooms are invaded under the guise of "inventory" searches. (Br. Res. 40; Br. ACLU 13). No such concerns are implicated by upholding searches of closed containers within the narrow context of police inventories conducted pursuant to standard procedures.

Respondent and the American Civil Liberties Union also claim that inventory searches are fraught with potential for "pretext" searches. However, the possibility of subterfuge exists whether or not closed containers are inventoried and, further, exists in connection with every exception to the warrant requirement. The possibility of abuse does not negate the reasonableness of such searches and does not require rejection of

closed container inventory searches. The solution instead is to suppress searches that are the product of such abuse.

Contrary to Respondent's suggestion, the boundaries of inventory searches are not limitless. Courts have been and continue to be fully capable of separating legitimate and illegitimate searches. Definite parameters of lawful inventory searches have been identified in the case law already. These include: (1) that there was a bona fide reason for the police to have contact with the automobile, (2) that there was a lawful basis to impound the automobile, (3) that there was an established, routine procedure for inventory searches of impounded automobiles, (4) that the established procedures were followed by the inventorying officer, (5) that only areas or containers that could reasonably be used for the storage of valuable or dangerous items were searched, and (6) that the inventory search was not used as a subterfuge to conceal an investigatory motive.[7]

Courts can apply these criteria when there is a claim of subterfuge or pretext. The trial court applied similar criteria to the evidence in this case and held as a matter of fact that the search was conducted in good faith and was not a pretext. (J.A. 81-82, 86-87). By this

---

[7] Several of these six criteria are explicitly mentioned in Opperman and Lafayette. Many subsequent cases have articulated these criteria, but two particularly thorough discussions are found in Hill v. United States, 512 A.2d 269, 273 (D.C. App. 1986) and Ciriago v. State, 471 A.2d 320, 323-324 (Md. App. 1984).

process courts will continue to protect the constitutional rights of all citizens.[8]

Finally, Respondent and the American Civil Liberties Union argue that a rule permitting inventory searches of closed containers in automobiles will swallow the distinctions hammered out in cases like United States v. Ross, 456 U.S. 798 (1982), New York v. Belton, 453 U.S. 454 (1981), and United States v. Chadwick, 433 U.S. 1 (1977). In many situations a vehicle inventory takes place unrelated to any arrest or criminal investigation, as in Opperman. Inventory searches can be distinguished readily from investigative searches, like those in Ross and Chadwick, or protective searches, like that in Belton, by resort to the criteria discussed above. To date courts have had no difficulty making these distinctions, nor is there any evidence in the case law that all exceptions to the warrant requirement will be subsumed under the heading of inventory searches.

---

[8] Many courts have used their supervisory powers responsibly and stricken down purported inventory searches that in fact concealed an investigative motive. Respondent cites several of these in his brief. (Br. Res. 19 n.8). See also, People v. Rutovic, 566 P.2d 705 (Colo. 1977); People v. Nogel, 484 N.E.2d 512 (Ill. App. 1985).

Respectfully submitted,

ALEXANDER M. HUNTER
District Attorney

C. PHILLIP MILLER
Assistant District Attorney

JOHN M. HARIED
Deputy District Attorney

RICHARD F. GOOD
Deputy District Attorney

OCTOBER 1986